S Veerasingam v Kerajaan Malaysia & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–01–39 OF 2001
ABDUL KADIR SULAIMAN, PAJAN SINGH GILL AND RAHMAH HUSSAIN JJCA
10 JUNE 2004

Administrative Law — Rights and liabilities of public servants — Termination of service on public interest — Retirement from service — Whether officer punished twice when coupled with disciplinary action — Whether termination order and disciplinary action were separate — Police Officers (Conduct and Discipline) General Orders (Cap 'D') 1980, General Order 44

Public Servants — Disciplinary proceedings — Procedure — Salary — Officer's salary reduced based on findings by disciplinary proceedings — Plea in mitigation — Whether officer given opportunity of making representation before punishment meted out — Whether decision-making process flawed — Police Officers (Conduct and Discipline) General Orders (Cap 'D') 1980, General Orders 25 and 36

The plaintiff was employed as a clerical officer by Keretapi Tanah Melayu Berhad ('KTMB'). Following an accident between two trains ('the said accident'), the plaintiff received a show cause letter on 17 May 1990 from an inquiry committee ('IC') which was set up to investigate the said accident. On 29 October 1990, the Public Services Commission ('PSC') invited the plaintiff to attend an interview for the post of station manager where he was to be on a one-year probation upon appointment. On 13 December 1990, the IC informed that the plaintiff that he was found guilty for the said accident which resulted in his salary being reduced by three points for a two-year period ('the disciplinary action'). On 20 March 1991, the PSC appointed the plaintiff as a probationary station manager. However, on 10 January 1992, the PSC informed the plaintiff that the Government of Malaysia had decided to retire him on grounds of public interest, effective 26 January 1992 ('the termination order').

Subsequently, the plaintiff commenced an action in the High Court against KTMB as the first defendant and the Government of Malaysia as the second defendant. He had also applied to add Perbadanan Aset Keretapi as the third defendant to the suit. He contended, amongst others, that the disciplinary action and termination order were *ultra vires* and wrong in law. The High Court dismissed his action, hence this appeal.

The issues before this court were (i) whether the disciplinary action was erroneous in law and the decision-making process flawed, in absence of an opportunity for the plaintiff to make a plea in mitigation before he was "sentenced" to a salary reduction; (ii) whether the decision-making process was flawed because the charge sheet was issued by the disciplinary officer, whereas the subsequent punishment was meted out by the chairman of KTM Head Office Disciplinary Board for group 'C' officers; and (iii) whether PSC and KTM both had, by their actions, created a binding agreement which could not be arbitrarily revoked in offering him the post of station manager.

Held, dismissing the plaintiff's appeal with costs:

(1) The penalty to be imposed here was not a dismissal or reduction in rank, but a reduction of salary by three points under GO 36(g). Even though GO 36 provides seven alternative penalties including dismissal and reduction in rank, para 2 of the show cause letter dated 17 May 1990 indicated that reference was made to GO 25 which encompasses procedures for breach of discipline "which merits punishment lesser than dismissal or reduction in rank". Thus, when the show cause letter was issued, the Disciplinary Authority had in mind any of the punishments under GO 36(a) to (g) but not a reduction in rank or dismissal, as in paras (h) and (i) which by virtue of GO 26(1) encompasses a different procedure as provided in GO 26(2) to (11) (see paras 18 and 20).

(2) The show cause letter was issued pursuant to GO 25(1) to inform the plaintiff of the facts of the breach of discipline alleged against him and he had been given the opportunity of making a representation in writing, against the allegation. GO 25(2) provides that after considering the representation, the authority shall determine whether or not the officer is guilty of the alleged breach of discipline and if it determines that he is guilty thereof, it shall impose any or more of the punishments specified in GO 36. Therefore unlike GO 26, there is no pre-set "mental state of mind" of the authority issuing the show cause letter that the plaintiff was already guilty of the disciplinary charges. The finding of guilt is only done by the authority in sub-para (2) after considering the representation of the plaintiff (see paras 25 and 26).

(3) The third issue raised was a non-issue as the contract of the post of station manager did not exist between the parties. An important clause in the offer letter (cl 2(d)) specified that he must have served in that post for at least one year before being confirmed as a station manager. But his services were terminated before his eligibility date. Therefore he had to revert to his earlier post of "*pegawai kerani biasa*" (see para 29).

(4) A termination order under GO 44 is a distinct and separate matter altogether. In the present case since the disciplinary action related to the said accident only whereas the termination order relates to the "... condition of service, the usefulness of the officer thereto, the work and conduct of the officer and all the other circumstances of the case" (GO 44(2)), the plaintiff had not been punished twice. Further the letter of termination dated 10 January 1992 had specified that the plaintiff had been terminated from service pursuant to GO 44(1) and (2) (see para 33).

[**Bahasa Malaysia summary**

Plaintif memegang jawatan pegawai perkeranian di Keretapi Tanah Melayu Berhad ('KTMB'). Berikutan satu kemalangan di antara dua keretapi (kemalangan tersebut'), plaintif telah menerima surat tunjuksebab pada 17Mei 1990 daripada jawatankuasa siasatan ('JS') yang ditubuhkan untuk menyiasat kemalangan tersebut. Pada 29 Oktober 1990, Suruhanjaya Perkhidmatan Awam ('SPA') telah menjemput plaintif menghadiri temuduga untuk jawatan pengurus stesyen dengan syarat beliau akan berada dalam

tempoh percubaan untuk setahun selepas perlantikannya. Pada 13Disember 1990, JS memaklumkan plaintif bahawa beliau didapati bersalah berkenaan kemalangan tersebut dan dengan itu gajinya dikurangkan sebanyak tiga poin bagi tempoh dua tahun ('tindakan displin'). Pada 20 Mac 1991, JPA telah melantik plaintif sebagai pengurus stesyen. Akan tetapi, pada 10Januari 1992, SPA mengumumkan kepada plaintif bahawa Kerajaan Malaysia telah memutuskan untuk menyarakan beliau atas kepentingan awam, berkuatkuasa 26 Januari 1992 ('perintah tamatkerja').

Plaintif kemudiannya memulakan tindakan di Mahkamah Tinggi terhadap KTMB sebagai defendan pertama dan Kerajaan Malaysia sebagai defendan kedua. Dia juga telah memohon untuk memasukkan Perbadanan Aset Keretapi sebagai defendan ketiga kepada tindakan berkenaan. Dia mengadu, antara lain, bahawa tindakan displin dan perintah tamatkerja adalah *ultra vires* dan khilaf di sisi undang-undang. Mahkamah Tinggi telah menolak permohonannya, maka rayuan ini.

Isu-isu di hadapan mahkamah ini adalah sama ada (i) tindakan displin salah dari segi undang-undang dan proses membuat keputusan cacat, dalam ketiadaan peluang untuk plaintif membuat rayuan bagi mengurangkan hukuman sebelum beliau "dihukum" dengan pengurangan gaji; (ii) sama ada proses membuat keputusan cacat kerana surat tuduhan dikeluarkan oleh pegawai displin, manakala tindakan selanjutnya dilaksanakan oleh pengerusi badan displin ibu pejabat KTM untuk pegawai katergori 'C'; dan (iii) sama ada SPA dan KTM kedua-duanya telah, melalui tindakan mereka, mewujudkan suatu perjanjian mengikat yang tidak boleh diketepikan sewenang-wenangnya setelah penawaran jawatan pengurus stesyen dibuat.

Diputuskan, menolak rayuan plaintif dengan kos:

(1) Penalti yang dilaksanakan di sini bukanlah pembuangan kerja atau penurunan pangkat tetapi pengurangan gaji sebanyak tiga poin di bawah PA 36(g). Walaupun PA 36 memperuntukkan tujuh penalti berlainan, termasuk pembuangan kerja dan penurunan pangkat, para 2 di surat tunjuksebab bertarikh 17 Mei 1990 menunjukkan bahawa rujukan telah dibuat kepada PA 25 yang merangkumi prosedur untuk perlanggaran displin "yang membenarkan hukuman wajar tidak sampai ke tahap pembuangan kerja atau penurunan pangkat." Maka, bila surat tunjuksebab tersebut dikeluarkan, pemikiran pihak berkuasa disiplinari tertumpu kepada hukuman di bawah PA 36(a) ke (g) dan bukannya pembuangan kerja atau penurunan pangkat, seperti di dalam para (h) ke (i) yang mana di bawah PA 26(1) merangkumi prosedur berlainan seperti yang diperuntukkan di bawah PA 26(2) ke (11) (lihat para 18 dan 20).

(2) Surat tunjuksebab dikeluarkan di bawah PA 25(1) untuk memaklumkan plaintif akan fakta-fakta perlanggaran displin yang ditujukan terhadapnya dan dia telah diberi peluang untuk membuat representasi secara bertulis terhadap tuduhan tersebut. PA 25(2) memperuntukkan bahawa selepas menimbang representasi tersebut, pihak berkuasa akan memutuskan sama ada pegawai berkenaan didapati bersalah atas tuduhan perlanggaran displin dan jika diputuskan bahawa dia sememangnya bersalah, ia akan

menjatuhkan mana-mana hukuman yang ditetapkan dalam PA 36. Maka, tidak seperti PA 26, tidak terdapat pemikiran di minda pihak berkuasa yang mengeluarkan surat tunjuksebab terlebih dahulu bahawa plaintif telah didapati bersalah atas tuduhan displin. Penemuan kesalahan hanya akan dilakukan oleh pihak berkuasa dalam sub-para (2) selepas menimbangkan representasi plaintif (lihat para 25 dan 26).

(3) Isu ketiga yang dibangkitkan tidak terpakai kerana kontrak perkhidmatan untuk jawatan pengurus stesyen tidak terwujud antara pihak-pihak dalam kes ini. Klausa penting dalam surat tawaran (kl 2(d)) menyatakan bahawa dia mestilah berkhidmat dalam jawatan tersebut bagi tempoh sekurang-kurangnya setahun sebelum disahkan sebagai pengurus stesyen. Akan tetapi perkhidmatannya telah ditamatkan sebelum tarikh kelayakannya. Dengan itu, dia seharusnya kembali ke jawatan terdahulunya sebagai pegawai kerani biasa (lihat para 29).

(4) Perintah tamatkerja di bawah PA 44 adalah suatu perkara yang terasing dan berlainan sama sekali. Dalam kes ini, oleh kerana tindakan displin berkaitan dengan kemalangan tersebut manakala perintah tamat kerja berkaitan dengan " … keadaan perkhidmatan, kebergunaan pegawai padanya, pekerjaan dan kelakuan pegawai dan fakta-fakta lain kes yang berkenaan" (PA 44(2)), maka plaintif tidak dihukum dua kali. Tambahan pula, surat pemberhentian kerja bertarikh 10 Januari 1992 telah menyatakan bahawa plaintif telah diberhentikan kerja di bawah PA 44(1) dan (2) (lihat para 33).]

Notes

For cases on termination of service of public servants on public interest, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) see paras 689–691

For cases on disciplinary proceedings involving public servants, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1792–1798

For legal proceedings involving public officers generally, see 7 *Halsbury's Laws of Malaysia*, para 120.095

Cases referred to

Balakrishnan v Ketua Pengarah Perkhidmatan Awam [1981] 2 MLJ 259 (folld)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114 (distd)

Hngh Ah Leong v Inspector General of Police & 2 Ors [1995] 2 AMR 1993 (distd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal [2001] 2 MLJ 417 (distd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal [2000] 3 MLJ 281 (distd)

Said Dharmalingam bin Abdullah v Malayan Breweries (Malaya) Sdn Bhd [1997] 1 MLJ 352 (distd)

Utra Badi K Perumal v Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor [1998] 3 MLJ 676 (distd)

Legislation referred to

Employment Act 1955 s 14
Federal Constitution Art 135(2)
Police Officers (Conduct and Discipline) General Orders (Cap 'D') 1980, GO 23, 25, (1), (2), 26(1), (2)–(11), 36, (a)–(i), 44(1), (2)

Karpal Singh (M Manoharan with him) (M/s Karpal Singh & Co) for the appellant
Azizah Nawawi SFC (Umi Kalthum Abdul Majid with her) (AG's Chambers) for the first respondent
Tan Ming-Li (YM Chin, Jennifer Chandran & C Vilasini with him) (M/s Allen & Gledhill) for the second respondent

Appeal from: Civil Suit No S2–21–92–94(2) (High Court, Kuala Lumpur)

Rahmah Hussain JCA (delivering judgment of the court):

[1] The learned trial judge had, on 9 May 2001, dismissed the appellant's (plaintiff in the High Court) claim with costs, against the first and second respondents (second and third defendants in the court below). However, on 3 October 2001, the appellant's appeal against the second respondent was struck off by another panel of the Court of Appeal. Hence, this appeal before us is only against the first respondent (Kerajaan Malaysia).

[2] Now, the brief facts of this case are these. The appellant was initially employed as a clerical officer by Keretapi Tanah Melayu (KTM), which was later corporatised and became known as Keretapi Tanah Melayu Berhad (KTMB) — the first defendant in the court below.

[3] On 18 February 1990, whilst the appellant was on duty with a porter at the Segambut Railway Station, an accident occurred between two trains. As a result of the accident, an Inquiry Committee was set up to investigate the cause of the accident. On 17 May 1990, a show cause letter was sent to the appellant. He replied to the show cause letter vide his letter dated 7 June 1990.

[4] Subsequently an inquiry was held. In the meantime the Public Services Commission (PSC) issued a letter dated 29 October 1990 to the appellant inviting him to attend an interview for the position of station manager.

[5] Then on 13 December 1990, the Inquiry Committee informed the appellant that it has made a decision and that the latter was found guilty of the aforesaid accident. Furthermore the appellant was informed that he would be punished by a reduction of salary by three (3) points for a period of two (2) years.

[6] The appellant appealed against the said decision vide his letter dated 11 January 1991. However, he was later informed vide letter dated 23 January 1992, from Malaysian Railway Administration (third defendant in the court below) that his appeal was dismissed.

[7] In the midst of the aforesaid disciplinary action and appeal, the PSC, vide its letter dated 27 February 1991, made an offer to him for the position of station manager, with the condition that he would be on probation for one year prior to confirmation.

[8] The appellant accepted the offer and was thus appointed as a station manager from 20 March 1991.

[9] However, on 10 January 1992, the appellant was informed by the Public Services Department (PSD) that the Government of Malaysia has decided to retire him on grounds of public interest, as of 26 January 1992. The material part of the letter stated:-

> "Tuan,
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> Adalah saya dengan ini memaklumkan bahawa Kerajaan telah memutuskan untuk menamatkan perkhidmatan tuan demi kepentingan awam di bawah Perintah Am 44(1) dan (2), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab"D") 1980 berkuatkuasa mulai 26.1.1992."

[10] Being dissatisfied with the decision of the PSD, and after much appeals, to various bodies, the appellant (plaintiff) commenced an action on 16 June 1994, initially against KTMB as the first defendant and the Government of Malaysia as the second defendant seeking *inter alia* for a declaration that the disciplinary action and alleged termination was *ultra vires* and wrong in law. Subsequently the appellant (plaintiff) made an application to add the third defendant (Perbadanan Aset Keretapi) as a party to the suit.

[11] The High Court dismissed the appellant's action with costs. Hence this appeal. Before us, the appellant challenged the correctness of the learned judge's decision on twelve grounds. It is to be noted at the outset, that there are two distinct actions taken against the appellant, in this case, namely "disciplinary action" and "termination order".

[12] Now, the first issue raised by the appellant is that, the disciplinary action was erroneous in law and that since he was not given an opportunity to make a plea in mitigation before he was "sentenced" to a reduction of salary by three (3) points, then the decision-making process was flawed.

[13] Learned counsel then referred us to the High Court case of *Utra Badi K Perumal v Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor* [1998] 3 MLJ 676. In that case the High Court had held that it was unjust to deny a civil servant an opportunity to be heard in mitigation before punishment was imposed on him as the punishment itself involved a further decision-making process. The defendant then appealed to the Court of Appeal, which dismissed the appeal. (See *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal* [2000] 3MLJ 281). However on further appeal to the Federal Court, after obtaining leave to appeal, the defendant's appeal was allowed. (See *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal* [2001] 2 MLJ 417).

[14] The Federal Court has made it clear that "there is no separate right to make representation upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank." The Federal Court also held that "no injustice had been occasioned to the respondent by the failure to hear his mitigation separately."

[15] In addition learned counsel for the appellant referred to the case of *Said Dharmalingam bin Abdullah v Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 MLJ 352, wherein the then Supreme Court held that "where an employee was denied the opportunity to make a plea in mitigation before sentencing by a domestic body this amounted to a partial denial of the employee's right to 'due inquiry' under s 14 of the Act." And by 'due inquiry' for the purpose of s 14 of the Employment Act 1955 ('the Act') the Supreme Court said it "includes the right to make representation against the punishment proposed as a result of adverse findings by a domestic body. An employee should not only have the opportunity to present arguments on 'liability' but also in mitigation of penalty."

[16] In response learned senior federal counsel submitted that the case of *Utra Badi* should not be followed as the requirement of mitigation is only limited to cases involving dismissal or reduction in rank. She then referred us to the case of *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114, whereby the then Supreme Court had held that:

> (2) The respondent had complied with the provisions of GO 23 and GO 26 of the Police Officers (Conduct and Discipline) General Orders (Cap 'D') 1980 ('the 1980 General Orders'). Following the procedure set out in GO 26, the respondent had correctly sent the appellant a show cause letter following closely the provisions of paras 1, 2 and 4. The show cause letter set out the grounds on which it was proposed to dismiss the appellant and invited him to furnish the respondent with a written statement which was accordingly furnished in great detail. Only when the respondent was satisfied that the written representation did not exculpate the appellant did he decide to dismiss him.

[17] Furthermore, learned senior federal counsel said that the right to mitigate was always there and that the cases cited by learned counsel for the appellant were decided before the *Utra Badi*'s case.

[18] In our view, the present case is distinguishable from the authorities cited by both parties, in that the penalty to be imposed here is not a dismissal or reduction in rank, but a reduction of salary by three (3) points under GO 36(g). Even though GO 36 provides seven (7) alternative penalties including dismissal and reduction in rank, it is clear from para 2, of the show cause letter dated 17 May 1990, that reference was made to GO 25 which encompasses procedures for breach of discipline "which merits punishment lesser than dismissal or reduction in rank."

[19] For ease of reference GO 25 is reproduced below as follows:

> 25(1) Where the Chairman of the Appropriate Disciplinary decides under General Order 24 that the breach of discipline alleged merits punishment lesser than dismissal or reduction in rank, the officer shall be informed in writing of the facts of the breach of discipline alleged against him and be given an opportunity of making a representation in writing, against the allegation.
>
> (2) After considering the representation under paragraph (1), the Appropriate Disciplinary Authority shall determine whether or not the officer is guilty of the alleged breach of discipline and if it determines that he is guilty thereof it shall impose any one or more of the punishments specified in General Order 36.

[20] Thus when the show cause letter was issued, the Disciplinary Authority had in mind any of the punishments under GO 36(a) to (g) but not reduction in rank or dismissal, as in paras (h) and (i) which by virtue of GO 26(1) encompasses a different procedure as provided in GO 26(2) to (11). **A**

[21] General Order 36 is hereby reproduced as follows: **B**

> 36. A Disciplinary Authority may impose on an officer any one or any combination of two or more of the following punishments:
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> (a) warning;
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> (b) reprimand;
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> (c) fine;
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> (d) forfeiture of salary;
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> (e) stoppage of increment;
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> (f) deferment of increment;
>
> (g) reduction of salary;
>
> (h) reduction in rank;
>
> (i) dismissal.

C

D

[22] Furthermore the decision in *Utra Badi*'s case related to the application of GO 23 and Article 135(2) of the Federal Constitution. Even under such circumstances, the Federal Court held that "there is certainly no separate right to make representations that ought to be meted out to the officer to be dismissed or reduced in rank." **E**

[23] In the circumstances, we are satisfied that the learned trial judge was right in his finding on this issue.

[24] The next issue to be considered is whether the decision-making process was flawed because the charge sheet was issued by the disciplinary officer, whereas the subsequent punishment was meted out by the Chairman of KTM Head Office Disciplinary Board for group 'C' officers. On this issue this is what the learned judge has to say: **F**

> "The 2nd defendant's response to this was to point out that this issue was not pleaded in the statement of claim; whereas in *Hngh* this issue was specifically pleaded. It is a cardinal rule of pleadings that parties are bound by their pleadings and ought not to be allowed to veer from their pleadings unless an application to amend had been made and allowed. In this case since the plaintiff had relied on *Hngh* as authority in support of the issue raised, the plaintiff ought to have at least applied to amend the statement of claim. Since this was not done, I have to rule that this issue is outside the pleaded case of the plaintiff and therefore a matter that this Court will not consider."

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[25] With due respect we are in total agreement with the learned judge's ruling. However, as the appellant had relied heavily on the case of *Hngh Ah Leong v Inspector General of Police & 2 Ors* [1995] 2 AMR 1993, we are of the view that it needs to be distinguished from the present case. In that case, which was under GO 26, the Inspector General of Police had made a *prima facie* finding based on the documents in his possession that there is a case, with a view to dismissal or reduction in rank, for the plaintiff to answer, which if unrebutted would warrant the given punishments. Whereas in our case the **I**

show cause letter was issued pursuant to GO 25(1) wherein the plaintiff was informed of the facts of the breach of discipline alleged against him and was given an opportunity of making a representation in writing, against the allegation. GO 25(2) provides that after considering the representation, the authority shall determine whether or not the officer is guilty of the alleged breach of discipline and if it determines that he is guilty thereof, it shall impose any or more of the punishments specified in GO 36.

[26] Therefore unlike GO 26, there is no pre-set "mental state of mind" of the authority issuing the show cause letter that the appellant is already guilty of the disciplinary charges. The finding of guilt is only done by the authority in sub-para (2) after considering the representation of the appellant. In other words, unlike *Hngh Ah Leong*'s case, the authority issuing the letter still has an "open mind" as to the guilt of the appellant. The finding of guilt is only made after considering the representation of the appellant.

[27] Thus for the above said reasons, we are satisfied that the principle of *Hngh Ah Leong* is inapplicable in the present case.

[28] Turning now to the issue that, since the PSC had offered the appellant the post of station manager and KTM had also made the same offer which had been accepted by the appellant, both the PSC and KTM had by their actions created a binding agreement which could not be arbitrarily revoked, this is what the learned judge has to say:

> "From the evidence of DW1, the plaintiff has not been confirmed in his post as station manager because he is only eligible to be considered for confirmation one year after, that is, after 20 March 1992. Before his eligibility date, his services were terminated with effect from 26 January 1992. Therefore, since he had not been confirmed in the post of station manager he had to revert back to his earlier post of '*Pegawai Kerani Biasa*'."

[29] Thus to us, the issue raised is a non-issue. There is no question that the contract of the post of station manager existed between the parties. An important clause in the offer letter (cl 2(d)) specified that before the appellant can be considered to be confirmed in the post of station manager, he must have served in that post for at least one (1) year and since in this case his services were terminated before his eligibility date, therefore he has not been confirmed in the post of station manager and has to revert to his earlier post of "*Pegawai Kerani Biasa*".

[30] As to whether the appellant was punished twice, once by KTM which had imposed punishment by reducing his salary by three points for a period of two years and again by the Government represented by the PSD, terminating his services by way of the letter dated 10 January 1992, the learned trial judge came to the correct conclusion when he said:

> "In the present case there is no punitive element, as the plaintiff has not been denied his pension. He has been pensioned off on the basis of public interest pursuant to GO 44(1) and (2). Since the termination is a distinct and separate action, I hold that the plaintiff has not been punished twice for the same offence."

[31] The Federal Court had clearly stated in the case of *Balakrishnan v Ketua Pengarah Perkhidmatan Awam* [1981] 2 MLJ 259, that a termination order under GO 44 is a distinct and separate matter altogether. At p 262 of the judgment the Federal Court said: **A**

> "... GO 44 comes under Part IV of the GO under the heading 'Miscellaneous' and opens with the significant *non obstante* clause "Notwithstanding these General Orders" thus making it quite separate and distinct from the preceding three Parts of the GO dealing with conduct, disciplinary procedure and general provisions pertaining to disciplinary punishments. GO44 goes therefore beyond and is additional to what precedes it." **B**

[32] Furthermore, Abdoolcader FCJ (as he then was) had said in the same judgment as follows (at p 263): **C**

> "There is no punitive element involved either in the termination of the appellant's service in the public interest. He has not been denied a pension and indeed the indication is that he will indeed be paid a pension once his pension factor is determined." **D**

[33] Thus in the present case since the disciplinary action relates to the accident only whereas the termination order relates to the "... condition of service, the usefulness of the officer thereto, the work and conduct of the officer and all the other circumstances of the case" (GO 44(2)), we are in total agreement with the learned judge's finding that the appellant has not been **E** punished twice. Further the letter of termination dated 10 January 1992 has specified that the plaintiff has been terminated from service pursuant to GO 44(1) and (2).

[34] On a final note, that is, learned counsel for the appellant's submission that since the charge sheet of 17 May 1990, stood infructuose after the expiry **F** of the one month, based on the "*Panduan Penyelenggaraan Tatatertib 1980*" ('*Panduan*'), we agree with the learned judge when he said:

> "I accept the 2nd defendant's submission on this that the *Panduan* is only a guide and that it does not have the effect of law. Further there is no mandatory requirement for it to be applied strictly." **G**

[35] For the reasons already given, we would dismiss the appeal with costs. The deposit will be paid to the respondent to account of its taxed costs.

[36] My learned brothers, Abdul Kadir Sulaiman and Pajan Singh Gill, JJCA, have had an opportunity of reading this judgment in draft and have expressed **H** their concurrence with it.

Plaintiff's appeal dismissed with costs.

Reported by M Maheswaran **I**